

*M Linn Bruce*

M. LINN BRUCE  
68 WILLIAM STREET  
NEW YORK

RECEIVED

FEB 1 - 1928

January 31st, 1928.

The Moderator of  
The General Assembly,  
156 Fifth Avenue,  
New York City.

My Dear Doctor Speer:-

I have your letter of the 24th inst. enclosing a Report on "Judicial Procedure" of a Committee of the General Council. Before attempting an expression of opinion which you request perhaps I ought, in fairness, to disclose my impression of the Report

The scheme seems to me wholly inadequate, fundamentally wrong and unworkable. It is an attempt to re-vamp the present Judicial Commission by correcting some of its demonstrated weaknesses - a sort of a temporary viaduct to carry part way over from the present unsatisfactory method to a scientific procedure.

When the Church speaks ex-cathedra it of course must speak by overture and when it ultimately interprets a dogma it should do so by the voice of the General Assembly. This power ought not to be delegated. All other controversies should be heard and finally determined by a Judicial Commission. This mental attitude gives bias to any opinion I may have. May I, therefore, comment on the Report paragraph by paragraph?

(Paragraph 1 p. 1)

If a nominee is voted for in all Presbyteries and must receive a majority of the votes cast in each Presbytery, will he have not only a "two-thirds of the whole number of Presbyteries" but also three-thirds?

(Paragraph 2 p. 1)

Fifteen members coming from fifteen Synods seem too many for concentrated work and unnecessarily expensive. The Supreme Court of the United States has nine members and the Court of Appeals of New York seven. Nine members will give more united effort than fifteen. This is to be a Court and not a legislative body.

(Paragraph 3 p. 1)

If the General Assembly sends down to the Presbyteries for election only the number of nominees necessary to fill the Commission, what choice have the Presbyteries?

(Paragraph 3 p. 2)

If the General Assembly "shall transmit" all "judicial business and cases" does this not include "any case administrative or judicial requiring judicial adjudication"?

(Paragraph 4 pp. 2, 3)

The Commission should not be required to meet at the time the General Assembly is in session as there may be no business to come before it. Moreover, it is not the proper time to hear, deliberate and determine judicial matters.

(Paragraph 1, p. 3)

There should be no appeal from a decision of the Commission except by leave of the Commission or of the General Assembly. The scheme proposed would keep some controversies going for three to five years. Of course, the Commission should have the powers, as all courts have of granting a new trial or rehearing for good cause shown and provided the application is made within a time fixed. No confirmation by the General Assembly of a final decision of the Commission should be required.

If the scheme is right the procedure provided on pages 4, 5, 6, 7, seems proper.

These summary comments may be of no value and hence consign them to your waste basket. I return the Report herewith.

Cordially yours,

*W. Linn Bruce*

J. Fairley Daly

COWAN & DALMAHOY, W.S.

E. J. McCANDLISH.  
G. F. HENDERSON.

TELEGRAMS: "AFFIDAVIT, EDINBURGH"  
TELEPHONE EDINBURGH 20297

RECEIVED

OCT 23 1927

Mr. Speirs

31, CHARLOTTE SQUARE,

EDINBURGH. 11th October 1927

Rev. J. Fairley Daly, D.D.,  
17 Park Circus Place,  
GLASGOW, C.3.

Dear Dr. Daly,

I return Dr. Speirs' letter to you of 14th  
ultimo.

The Regulations in regard to Cases is set forth  
on pages <sup>79</sup>~~111~~ and <sup>100 to 108</sup>~~114~~ to ~~119~~ of the Manual of Practice and  
Procedure of the Church issued in 1927, and you will find the  
standing orders on the conducting of Cases on page 435 of the  
Acts of the Assembly of 1927. From these you will see that the  
Assembly is the final judicial Court of the Church, and except  
in very special Cases the Assembly has been able to dispose of  
Cases brought before them without the long hearings referred to  
in Dr. Speirs' letter. In some Cases, as you mention, a Remit  
has been made to a Commission to look into a Case and report,  
generally where it has been found advisable that parties should  
be/

(Judicial)

Rev. J. Fairley Daly, D.D.

be interviewed locally with a view to a settlement of the question in dispute. *In some cases the Commission is given power to decide the case and report its decision*

As far as my knowledge goes, the judicial procedure in the Church has worked well.

B2

I am,  
Yours very truly,

*J. Fairley Daly*

*for cases of Discipline before the Synod see  
p 106 of the Manual. (b/p 79-95)*

My dear Mr. Speers

Before replying to your important request as to our judicial procedure, I thought it desirable to consult our Legal Adviser in the United Free Church so that you might have exact reliable information. The above is his reply.

The Manual to which he refers is just out, & will be presented at once to our General Assembly, but as you require information now I send you <sup>per post</sup> my copy of old Manual, which gives without change our judicial procedure, & all the information you desire.

Do not think of sending it back. I am getting the new Manual which very shortly will be scrapped when comes our Scottish Union!!!

With our warmest regards

Yours very truly

*J. Fairley Daly*

Oct 12 '29

*Henry C Swearingen*

# House of Hope Presbyterian Church

ST. PAUL, MINNESOTA

RECEIVED

JUL 28 1927

July 25, 1927

Mr. Speer

Robert E. Speer, D.D.,  
156 Fifth Avenue,  
New York, N. Y.

Dear Robert:-

Replying to yours of July 20th will say that the appointment of Judge DeWitt in the place of Mr. Loomis will meet with the enthusiastic approval of everyone who knows the Judge. Of course, I am pleased to see Comin on the Commission because he is a worthy and able fellow.

Your letter addressed to the Committee of the General Council on Judicial Procedure is a masterly analysis of a disturbing situation. Every Moderator has had his troubles with this thing. My own judgment is clear that you have suggested the right solution. Sooner or later, we must have a supreme court by whatever name it may be known, one constituted for the purpose of acting judicially. Whether the Church is prepared to take so long a step at once, I do not know. That is a practical question concerning which we must reach conclusions after conference. Agitation of the matter will have an educational effect and will do good in the way of preparing the mind of the Church for what must come eventually, whatever the number of intervening steps which must be taken before reaching the goal.

Am taking the liberty of calling Dr. James H. Speer's attention to the circular which you enclosed. This distresses me somewhat. Everything which we put out should have a dignity worthy of our Church and its history.

With all good wishes,

Very cordially yours,



Henry Chapman Swearingen

HCS:MD

RECEIVED

JUL 25 1927

Warren A. Laudon

JWS

SAN FRANCISCO THEOLOGICAL SEMINARY  
SAN ANSELMO, CALIFORNIA

OFFICE OF THE PRESIDENT  
20 KENSINGTON ROAD

Dr. Speer

June 28, 1927.

Robert E. Speer, D.D.,  
New York, N.Y.

My dear Dr. Speer -

I returned late last evening from a vacation trip of two weeks in the Yosemite. I find your gracious letter of the 14th awaiting me. I appreciate it very much. I wish to express to you again my gratitude for the honor you conferred upon me. It was a high privilege to be associated with you in the conduct of the greatest Assembly I have attended, and I have attended more than twenty. Your own fine Christian spirit dominated the Assembly. The absolute confidence which the entire Church has in you enabled you to guide the Assembly safely over some rough places where a less experienced and a less trusted man would undoubtedly have met with defeat and possibly disaster.

I share your anxiety in regard to the judicial business of the Church. I believe the rule under which we are now operating is unwise and dangerous. In the earlier days of the Judicial Commission I served on it for three years. There were some able jurists on it. We took infinite pains. We spent six days and nights one year on a single case. There was then no review or revision. It would have been humiliating to have had a decision arrived at with exceeding care reversed or revised under the influence of platform speech and party passion. I believe it is a serious question whether our ablest jurists will be willing to serve on this Commission if the present rule is to continue in force.

If the decisions of the Supreme Court of the United States were subject to review and revision by Congress how long would it take this country to reach chaos? The Supreme Court can make mistakes, has made them. Nevertheless it is the great safeguard of our Constitution. No Judicial Commission can be infallible. It will be liable to err. Yet we must trust someone. What body can we more safely trust than a carefully chosen Judicial Commission?

Would it be possible to persuade the Church to make the decisions of the Commission final? Something approaching that at least should be done if our constitution is as important as some of us think it is.

In any case great care should be exercised in the selection of the members of the Commission. I am not entirely satisfied with the present method. The electing sections name a nominating committee. It is often carelessly chosen as I know from recent experience. When it is organized, with the exception of the chairman, there are not many on it who have a sufficient acquaintance with the Church to be helpful in making wise nominations. The chairman is approached by commissioners who are eager to have their friends placed upon this important Commission. I would prefer to have its members nominated to the Assembly by a committee composed of the ex-Moderators who have had an opportunity to know the Church widely, or by the Council. This would not be as democratic a method as the present. But if we are to give such a Commission great powers, we must use the utmost wisdom in their selection.

Robert E. Speer, D.D. -2-

Please pardon the length of this epistle. But I am somewhat agitated over this subject, as I am sure you are.

Yours very cordially,

Warren H. Landon

Warren H. Landon

SAN FRANCISCO THEOLOGICAL SEMINARY  
SAN ANSELMO, CALIFORNIA

OFFICE OF THE PRESIDENT  
26 KENSINGTON ROAD

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~~107~~

August 15th, 1917.

Dr. W. Spear, D.D., LL.D.,  
120 Fifth Avenue,  
New York, N.Y.

Dear Dr. Spear,

It is some time since I received your good letter of July 26th. I wish to thank you for all your kind expressions.

I appreciated also your sending me a copy of your letter to the Special Committee of the General Council. Upon a careful reading of it one is impressed at once with the range of difficulties that arise in connection with our present judicial system. I was surprised myself, though I have given some study to the whole subject, I doubt whether the last General Assembly realized the difficulties with which you were contending and with which the Moderator of any Assembly must contend unless some change be made.

I gather from your letter to the Council that you favor a permanent Court. I entirely sympathize with you.

Of the three suggestions made by Dr. Ward, Dr. Coatsworth, and Dr. Judge, I very much prefer that presented by Dr. Judge. If we cannot establish a permanent Court, either that procedure or something like it should be definitely decided upon. It, however, would allow of a review of the preliminary judgment, which is the principal danger point.

I am somewhat surprised that Dr. McCartney considers the permanent Judicial Commission "in reality" only a committee. I am quite confident that was not what the Assembly had in mind when it first set rain a upon a permanent Judicial Commission. If that view should be entertained it would simply put us back where we were before when Assemblies more than once took two days out of the heart of their meeting for judicial trials, interrupting the work of the great Missionary Boards and other important matters that should have received the attention of the Assembly.

As a matter of private study apart from the discussion now before the Church, I have been reading works on the Constitution of the United States. One of the most interesting is by James M. Beck of Washington, entitled "The Constitution of the United States", published in 1914. One of the chapters is on "The Balance-wheel of the Constitution". He is treating, of course, of the judicial system required by the Constitution, and particularly the Supreme Court. He says, "The United States embodied it in its form of government and thus made the judiciary and especially the Supreme Court the balance-wheel of the Constitution. Without such power the Constitution could never have lasted, for neither executive officers nor Legislatures are good judges of the extent of their own powers. Nothing more strikingly shows the spirit of unity which the Constitution brought into being than the unbroken success with which the Supreme Court has discharged this difficult and most delicate duty." He furthermore quotes Mr. William Howard Taft as follows: - "If the judiciary be struck from the system, what is there of any value that will remain, for government cannot subsist without it. It would be as rational to talk of a solar system without a sun."

I am convinced that as we are a Church with a constitution we cannot be on safe ground until we have a permanent Court, very carefully



Dr. Robert M. Speer, -1-

selected, which we will regard with confidence and the same reverence which we as a nation render to the Supreme Court of the United States. As I indicated in a former letter, this does not mean that we do not expect them to be infallible. It means that we will have a judicial body whose findings will be as permanent as those of the Supreme Court of the United States.

I do not need to add that I am deeply interested in an undertaking which is requiring such careful thought. You could not undertake anything of larger importance aside from the great missionary work in which you have been so important and influential a leader.

Yours very sincerely,

Warren H. Landow

WHL:CSB

## Is right of minority opinion unlimited

- 1. Right to be there part of what business?
- 2. How can majority determine its proposals  
Can there be a minority group of 3' steps to find its spots
- How about not a excluding matter given for  
debate on motion to remove?
- How should recent years - about only findings  
of fact by Judicial Commission?
- How number of the Judicial from a right to argue?
- Are Practitioners who are not members of a delegate  
And complaint of and excluded from participation  
The excluded later comes in and out of order; explains  
They are in allowing Bruce Savage to speak  
General's case is coming on the platform  
The court shall come in it comes in spots of order  
more than the 14 judges. Hearing too come in.  
Yes, not a court. John a politician of a trial  
Exclusion proper! this motion will really

# Judicial Procedure

1. Constitution & membership of Commission
2. Procedure
3. Grounds of order

If a remedial case comes back with two grounds  
it is before the court in respect of the first ground  
to remove. <sup>As per</sup> <sup>of</sup> <sup>the</sup> <sup>Commission</sup> <sup>is</sup> <sup>not</sup> <sup>bound</sup> <sup>to</sup> <sup>consider</sup> <sup>the</sup> <sup>second</sup> <sup>ground</sup> <sup>if</sup> <sup>the</sup> <sup>first</sup> <sup>ground</sup> <sup>is</sup> <sup>not</sup> <sup>proved</sup>.  
If <sup>the</sup> <sup>first</sup> <sup>ground</sup> <sup>is</sup> <sup>not</sup> <sup>proved</sup>, the court is bound to consider the second ground.  
If <sup>the</sup> <sup>first</sup> <sup>ground</sup> <sup>is</sup> <sup>not</sup> <sup>proved</sup>, the case is heard

1. 15 members

Two years for 50

2. 6/11 on 2 fund

3. 6/11 for 5 years & eligible to re-elect

4. Judgment fund - no directly expenses

5. Under the that direct

6. The 6/11 year end - dependent on number of members

7. 3 majority of year end accepted after that to 6/11

or future fund under amended

3. 7/11 in 1345 and no claim in 1346

for. But again in 135 there the 6/11 is stated

8 facts for the 6/11 in 2 direct allowed

the 6/11 has to be proposed. Then the 6/11 is adjusted for it.

6/11 is the report also. Some times a directly of 6/11

Memo:-

In re: PROCEDURE OF THE GENERAL ASSEMBLY IN JUDICIAL CASES

In his comprehensive letter of July 18th, 1927 the Moderator of the General Assembly presented several important questions for consideration. In the discussion herein contained it seems desirable at the outset to refer briefly to some rather essential notions more or less pertinent to the general topic.

The Nature of a Court      A court is a place where justice is judicially administered. It is also an organized body constituted to hear and decide issues of fact or law and/or issues of fact and law. The constituent parts of a court are the judge (or judges), the clerk and (in civil courts for the trial of issues of fact) a jury. In addition to these might be mentioned the sheriff, the bailiff, et cetera. For our purposes we may disregard all actors save only the judge, or judges. The functions of a judge are highly important. He considers the evidence or the record, as the case may be, he analyzes the issues, he compares and weighs the arguments, he examines the law applicable to the issues, he studies, he deliberates, he decides and formulates his decision or judgment.

Qualifications of a Judge      It requires no argument to show that a judge ought to possess special qualifications. He should be "learned in the law," fair minded, impartial, without bias, not personally interested in the cause. His appointment or election should have no reference to pending disputes. Preferably he should be a man of some experience in the consideration and determination of controversies, especially if the issues are important. The average man may serve acceptably as a juror (deciding questions of fact only) but the average man, without careful training and broad experience, can hardly be expected to qualify as a judge to sit, hear and determine constitutional and legal issues.

Transforming Administrative or Legislative bodies into Judicial      At this point inquiry may be made whether bodies selected and constituted primarily for the performance of administrative or legislative functions may wisely and effectively be converted into judicial bodies. Is it probable that satisfactory results will be obtained by this procedure? We are not without precedent. Under the English Constitution the upper house of Parliament - the House of Lords - the duties and powers of which are chiefly legislative, performs important judicial functions. Here we have (nominally) a large body of men (nearly as large as our General Assembly) composed of Ecclesiastics, Princes, Dukes, Earls, et cetera, et cetera - Lords Spiritual and Lords Temporal - sitting as the court of final appeal for cases arising in the United Kingdom. (The Privy Council is also a court of last appeal for cases arising in India and in the Colonies.) According to the English Constitution all the Lords have a right to participate in the judicial business of the House;

it is well understood, however, that the judicial business is, in fact, confined to a few members, i.e. The Lord High Chancellor, the Lords of Appeal in Ordinary, and such other Lords as are holding, or have held, high judicial offices.

Prior to 1846 in the Commonwealth of New York, U. S. A., the upper house of the General Assembly - the Senate - exercised judicial functions, hearing and deciding judicial cases as the court of final appeal (within the state) and called, I think, the Court for the Correction of Errors. My recollection is that in this body (chiefly legislative) the judicial work was, in fact, performed by a limited number of men designated and set apart for the purpose because of their superior learning, legal training and judicial experience. In 1846 this court was abolished and in its place erected the Court of Appeals, the existing court of last resort within the State.

In the nature of the case it is impracticable, perhaps impossible, to erect a truly judicial body from several hundred men (admittedly high-minded and thoroughly conscientious) chosen at random throughout the church. The conditions under which commissioners are elected, the partisan discussions which frequently precede their selection, the lack of antecedent training, the want of experience of large numbers, too frequently the tendency to pre-judge important issues -- all these combine to impair the value of the General Assembly as a court and to that extent weaken the force of its judicial pronouncements. If the questions involved were questions of fact the objection would lose much of its weight, but the issues are legal and constitutional and hence deserve examination by a body possessing the judicial temper and training. Perhaps it is for reasons such as these that the General Assembly rarely reviews and modifies the judgment of the Judicial Commission. How can the influence of the Judicial Commission be enlarged? How can this body be developed and strengthened so that its judgments will carry greater weight? The Judicial Commission has many of the elements of an ideal court, how can its organization be perfected? Would it be objectionable to lengthen the term of office - say to five years or perhaps to six years? (See Dr. Macartney's suggestion) Justices of the Supreme Court of the United States are appointed for life. In the States judges of the highest court of appeal are chosen for long terms. Is it possible to place more stress upon the selection of the personnel and thereby assure the Church that the members of the Commission will possess ideal qualities and qualifications so desirable for judicial deliberation? Will the Church consent to abrogate the power of the General Assembly to speak the last word in judicial cases? Probably not. In spite of the obvious weakness of the Assembly as a judicial body it seems improbable that the power to determine and decide will be surrendered. The alternative seems to be to exalt the influence and augment the prestige of the Judicial Commission so that its preliminary judgments will be entitled to the highest respect and thereby command the approval of the Assembly.

Judicial Commission. The right of dissent

That a member of the Commission has the right to dissent seems obvious. Does it necessarily follow that a single dissenting member should be accorded the privilege of presenting his opinion to the Assembly? The answer is negative, it does not necessarily follow. This is a question of procedure. Is it wise, is it expedient to permit one member to command the attention of the Assembly? The question is fairly debatable. Historically it would appear that there have been instances in which a minority, perhaps a minority of one, have been right. In this connection it should be remembered that, in any event, the Assembly retains the right to review, et cetera. The question is a practical one. Should a single dissenting member be permitted to challenge the soundness of the judgment of the Commission and thereby encourage or incite a movement to review the case? Men will always differ on such a point. My notion, first blush, is that a dissenting opinion should not be presented to the Assembly (the Court) unless three members concur in the dissent. (This, I believe, is Dr. Mudge's suggestion.)

Notification of Dissent

It seems clear that if there is a dissent the fact should be brought to the attention of the Commission in ample season to permit the majority, by rejoinder or otherwise, to review the points covered by the dissenting opinion. While it may seem impracticable to limit, by rule, the form or content of a dissenting opinion, nevertheless ordinary fairness requires that such opinion be reduced to writing and read to the Commission under circumstances permitting the majority to reply as they may be advised. Such practice would prevent one of the factors of confusion so evident at San Francisco.

Reading Rules to the Court

I do not remember whether it has been the custom of the Moderator, upon and after convening the Court, to read (or request the Stated Clerk to read) to the Court the rules relating to procedure, perhaps emphasizing certain portions of these rules and particularly admonishing the members of the Court that the body is not then sitting as a parliamentary body but rather as judges, et cetera, et cetera.

The Procedure Rule 133

The following procedure seems appropriate:-  
 Upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the following motion shall be in order and the Moderator of the General Assembly shall assume and shall clearly state that such motion has been duly offered and seconded; that is to say, "That the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly."

It will be permissible, at this point in the procedure, for any member of the Court (any enrolled commissioner to the General Assembly) to offer the following written motion (as a substitute); towit, "That the preliminary judgment of the Permanent Judicial Commission be reviewed," accompanied by a short and concise written statement, without argument, of the salient reasons for the motion.

Thereupon, without debate, the question shall be put to the Assembly and the vote taken.

If the Court votes to review

If any case is reviewed by the Court why should not the members of the Court enjoy all the advantages which were possessed by the Commission, that is to say, in the search for truth and wisdom, in the attempt to reach and formulate a sound judgment in the case, why not offer the members of the court the same opportunities for inquiry and investigation that were enjoyed by the Commission. More specifically, why deprive the members of the court of the contents of the Record in the case with all properly authenticated documents. Why deny to the members of the Commission the privilege of discussing and elucidating the questions at issue. Presumably everyone desires to reach the truth, to discover the basis for sound judgment, to find the correct rule of law, to ascertain the appropriate interpretation of the Constitution of the Church as related to the issues presented for consideration. Who are more capable of assisting in this search for wisdom and right decision than the men who have specialized in the principles involved and intensively studied the issues of the instant case. Furthermore, have not the members of the Commission a natural right to elaborate, expound and defend the judgment that has been presented to the court. This privilege would, of course, be accorded majority and minority alike. Apparently there is some difference of opinion on the foregoing point. Is the Judicial Commission an intermediate court of appeal, or is it an arm or instrumentality of the General Assembly? If the Judicial Commission is an intermediate court of appeal then it would seem to be illogical and improper for the members of the Commission to participate in the deliberations of the higher court (the General Assembly) upon a review of the preliminary judgment reported by the Commission. On the other hand if the Commission is an agency or an instrument of the General Assembly for the convenient consideration of judicial cases and to be regarded as a part of the mechanism of the highest court by the operation of which this court reaches a final judgment in any given case, then it would seem logical and proper to accord the members of the Commission the privilege of participating in the discussion of the issues, upon review. Such practice would be instructive and helpful and would, ordinarily, greatly aid the court in its effort to arrive at a just decision. The Commission is elected by the General Assembly, it is the creature of the General Assembly, it reports to the General Assembly and must be treated as a vital working part of the Assembly's machinery. It is not, therefore, an intermediate court of appeal and the review of the preliminary judgment as reported by the Commission is not the hearing of an appeal from the judgment and decision of the Commission.

No man should Judge his own cause

This maxim is ancient and well founded. To permit one who is interested in the subject matter of litigation to act as a judge in the case offends our sense of propriety, it is contrary to natural justice. The Book of Discipline, Chapter IX Section 98 (1922 ed.) provides that "Neither the appellant, nor the members of the judicatory appealed from, shall sit, deliberate or vote in the case." What does this rule mean? Is it too sweeping in its scope? Does it mean, for example, that all



commissioners to the General Assembly from all of the Presbyteries of a particular Synod are disqualified and disfranchised if that Synod is the judicatory from whose decision the appeal in the instant case was taken? If so, is the rule sound or unsound, fair or unfair, equitable or inequitable? It may be profitable to examine the reason or spirit of the principle involved. We say that no man should judge his own cause. Why not? Because if he has an interest in the outcome of the controversy, if his status is at stake, if his pecuniary or property rights are challenged in the dispute, if any other privilege or right is in jeopardy, then that man will find it very difficult, perhaps impossible, to be impartial, free from prejudice and without bias. Common experience teaches us that a man with such an interest will, unconsciously perhaps, permit that interest to warp his judgment and becloud his vision. But not every kind of an interest will thus disqualify. The interest, to disqualify, must be proximate, not remote. To illustrate, an officer or director of a private corporation should not sit as judge in a controversy in which the pecuniary or proprietary affairs of the corporation are in jeopardy, he is disqualified because of interest. The same is true of a stockholder of a private corporation organized for pecuniary gain. On the other hand the fact that a judge is an elector or a taxpayer of a public corporation (town or city) will not disqualify him from sitting in a litigated case in which the status or property or rights of the municipality are directly involved. In such case the interest is deemed too remote to disqualify. How shall this principle be applied in the deliberations and voting of the General Assembly sitting as the highest judicial body of the Presbyterian Church? Let us say that a judicial case has its origin in the Presbytery of Los Angeles. In due course the cause is heard, on appeal, by the Synod of California. The Presbytery of San Francisco is not a party to the case. True, in a certain sense, this Presbytery is represented in the Synod. From another point of view the Presbytery, in its organized capacity, is not represented at all -- "A Synod is a convention of the bishops and elders within a larger district, including at least three presbyteries."

The case goes to the General Assembly. Shall the commissioners elected from San Francisco Presbytery sit, deliberate and vote? Is the interest of these commissioners and their Presbytery proximate or remote? Surely the rule under discussion needs clarifying. Should it be modified as well?

Should the Court Re-convene	Probably not. A recess may be taken but provision for re-convening the court would tend to confusion.
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d. a. r.

156 Fifth Avenue, New York City

July 18th, 1927

Dr. Mark A. Matthews,  
Dr. Henry C. Swearingen,  
Dr. Charles R. Erdmann,  
Dr. J. W. MacIvor,  
Mr. A. A. Reed

Dear Friends,

As you know you constitute the Committee to which the General Council has referred for report at its November meeting the questions committed to the Council at the last General Assembly as to the desirability of any changes in the procedure of the Assembly in the matter of judicial cases. The experience of the last Assembly brought to light some of the difficulties which members of the General Council had already foreseen, and other difficulties which had not been foreseen but which were clearly revealed by the tests to which our present rules were put in connection with the consideration of the Report of the Judicial Commission.

For the sake of convenience, it may be well to recall the precise language of the present rules.

"132. Immediately upon the presentation of the preliminary judgment in a case, any member or members of the Commission shall have the right to read and file a dissenting opinion or opinions.

"133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any, shall be as follows:

Immediately upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the Moderator of the General Assembly shall put the question, without debate, 'Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?'

If a majority shall vote in the affirmative, the preliminary judgment of the Permanent Judicial Commission shall be declared by the Moderator to be the final judgment of the General Assembly.

If a majority shall vote in the negative, a motion, debatable except on the merits of the case, will be in order to review the preliminary judgment of the Permanent Judicial Commission.

"134. The preliminary judgment in any case when reviewed by the general Assembly to which it has been reported, may be affirmed, reversed, modified, suspended, or remitted for further hearing. In this review, instead of the record in the case, the finding of the facts by the Judicial Commission shall be read. On such review, if the case be not remitted, the decision of the General Assembly shall be held to be its final judgment. If the case be not reviewed by the General Assembly to which it has been reported, or if it be reviewed and no decision be reached, then at the dissolving of the same the preliminary judgment of the Permanent Judicial Commission shall be held to be the final judgment of the General Assembly."

This procedure is clear and simple if there is no dissenting opinion and if the General Assembly accepts the preliminary judgment. But, if there is a dissenting opinion or the Assembly does not accept the preliminary judgment; or if both these contingencies occur, then, questions of increasing perplexity arise.

1. The rules contain no qualifications whatever with regard to the minority opinion. (a) They do not require that it should be read to the Commission or even that the Commission should be notified that it is to be presented. At the last Assembly the Chairman of the Commission stated that the Commission had concluded its business and adjourned to report to the Assembly with the understanding that no dissenting opinion would be presented and it did not know of such opinion until it was just about to come on the platform and the Moderator had announced the appearance of the Commission. (b) Nothing is said as to the nature or limits of such an opinion. It may happen, and usually does happen, in the case of minority opinions, that they do not confine themselves to the scope of the majority opinion and that they introduce personal argument, as it is almost inevitable that they should in order to justify the dissent. It may even happen that such opinions are inappropriate in their form or content but if unread to the Commission there is no chance to point this out. The Moderator has no knowledge in advance and would be in a difficult position if he should interrupt such an opinion or question its propriety.

2. If the Assembly declines to accept the preliminary judgment the only motion then allowable is the motion to review the preliminary judgment. The dissenting opinion does not become the motion before the Assembly as some have erroneously supposed. After the motion to review has been carried, then, it is possible for the Assembly either to confirm, reverse, modify, suspend or remit the preliminary judgment. I suppose it would be possible for it, if it desired, to substitute the dissenting opinion for the preliminary judgment, but this could not be done until after the motion to review the preliminary judgment had carried. The present rules state that the motion to review is "debatable except on the merits of the case". The experience of the last Assembly seemed to indicate that this limitation was impossible of enforcement. Both sides in debating the motion went into the merits of the case. How can the Moderator enforce this provision? He does not know in advance what is to be said; when it has once been said it cannot be unsaid and any objection to it by the Moderator will be unacceptable to the part of the Assembly whose view it represents.

When the Assembly has voted to review the preliminary judgment and in proceeding to review it the present rules state "that in this review instead of the record in the case the finding of the facts by the judicial Commission shall be read,

- (a) How is the record of the case to be excluded and only the Judicial Commission's finding of the facts to be permitted to come before the Assembly?
- (b) Does the right of any member or members of the Commission to read and file a dissenting opinion involve also their right to present a dissenting finding of the facts?

3. Have members of the Judicial Commission any right to speak? At the last Assembly the members who presented the preliminary judgment and the dissenting opinion both claimed the right to speak. The presenter of the dissenting opinion attempted to make motions and when this was objected to he asked some members of the Assembly to make the motion for him. No one knew that he was expecting to do this and once it was done it could not be undone. If it is improper for members of the Judicial Commission to speak, then, ought it to be provided that they shall not be Commissioners at the same time that they are members of the Commission? As Commissioners it would be difficult to deny their right to speak in any discussion of the motion to review or in any subsequent motion.

4. Is there need of clarifying the application of the rule that members of judicatories who are parties to an appeal may not deliberate or vote? Some of our lawyers contend that this rule would not apply to Commissioners from presbyteries of a delegated Synod who were not actually members of the Synod meeting whose actions are the subject of appeal or protest.

5. If errors had been committed in the consideration of a judicial Commission report and the Assembly desired on the following day to reconvene as a court and reconsider the matter, how could this be done? If provision is to be made for this, ought not the Judicial Commission to be required to remain at the Assembly until the end? Even if it does, however, can the Assembly itself be so accurately reconstituted on the following day as to involve the same personnel?

6. This question suggests the <sup>question</sup> gravest of all, namely, as to whether the General Assembly is or ever can be made a genuine court? It may, of course, verbally be called a court, but can it ever possess the judicial temper and meet the intellectual and moral and spiritual requirements of a court? By nature and constitution the General Assembly is a convention or assembly, and the problem which is in the minds of many is as to whether any change whatever in rules of procedure can reach the real root of our problems? It is said that our Government and our Church are built on the same model, but in this particular they are fundamentally and radically different. The Supreme Court and the Congress of the United States are not the same body and never could be. No legislation or mere rule of constitutional procedure could ever turn Congress into a court. Again and again our Assembly, though constituted as a court has been disqualified in acting as such. People who are not members of the Assembly have sat in it and have made suggestions to its members. The Book of Discipline provides that "no member of a judicatory who has not been present during the whole of a trial shall be allowed to vote on any question arising therein except by unanimous assent of the judicatory and of the party." It has been justly criticized that some interested parties voted in the last General Assembly. That was true of more than one case and of representatives of more than one body. A number of commissioners came in during the Report of the Commission and voted. The ushers had been instructed to guard the entrance but at one important point a large group of Commissioners, 20 or 30 or more, found an unguarded entrance between the curtains and came in and participated.

Of course, it can be left to the honor of the Commissioners to observe the rules but in the excitement of issues they are pretty sure to forget and no Moderator will be able impartially and absolutely without exception to enforce them.

I think these are the important issues which observation of the procedure at the last Assembly suggest. The question which arises is as to whether the problem can be best cared for on the whole by amendments as to the present rules or whether the attempt should be made, as suggested by Dr. Matthews and Dr. Swearingen, I believe, to establish a real court.

I have received three illuminating suggestions with regard to amendments in the present rules of procedure.

The first is from Mr. Reed, who suggests the following substitute for Section 133, which I have quoted at the beginning of this letter:

"133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission and of a dissenting opinion or opinions, if any, shall be as follows:

Upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the following motion shall be in order and the Moderator of the General Assembly shall assume and shall clearly state that such motion has been duly offered and seconded; that is to say, "That the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly."

It will be permissible at this point in the procedure, for any member of the Court (any enrolled commissioner to the General Assembly) to offer the following written motion (for a substitute); to wit, 'That the preliminary judgment of the Permanent Judicial Commission be reviewed,' accompanied by a brief and concise written statement, without argument, of the salient reasons for the motion.

Thereupon, without debate, the question shall be put to the Assembly and the vote taken."

The second is from Dr. McCartney, whose loss on the General Council we must all lament as his ex officio term expired at the last Assembly and there was no vacancy to which he could be appointed on the Council.

"1. The term of service for a member of the Judicial Commission ought to be five years.

2. It must be made plain to the Chairman that this Commission is in reality only a Committee, reporting to the Assembly, and not a Commission from whose judgment there is no appeal, as in the case of presbyteries and Synods.

3. The right of members of the General Assembly not only to support a dissenting judgment, if read, or another motion ~~to renew~~ from the floor, should be carefully guarded.

4. The law should clearly provide that no member of the Judicial Commission, after the judgments have been read, should argue the case, or plead for the judgments; as did Judge Bruce at the last General Assembly.

5. Members of judicatories complained against, should not have a vote in the Assembly, when the case of such judicatory is up for consideration."

The third is from Dr. Mudge, who suggests the following substitute for Sections 132 and 133:

Section 132. Immediately upon the presentation of the preliminary judgment in a case, any three members of the Commission shall have the right to read and file a dissenting opinion, provided said opinion has been read in full and filed at a sitting of the Permanent Judicial Commission, held at least twenty-four hours prior to said presentation. If there be a dissenting opinion, the majority of the Commission may read and file a rejoinder immediately following the presentation to the General Assembly of said dissenting opinion.

Section 133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any, and of a rejoinder or rejoinders therein, if any, shall be as follows:

Immediately upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, and the rejoinder or rejoinders thereto, if any, the Moderator of the General Assembly shall put the question, without debate, "Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?"

If a majority shall vote in the negative, then the finding of the facts by the Permanent Judicial Commission shall be read and a motion debatable, except as to said facts, will be in order to review the preliminary judgment of the Permanent Judicial Commission."

I have raised with Dr. Macartney the question as to whether the conception of the Judicial Commission as only a Committee of the Assembly may not raise added difficulties. (a) Would it not tend to make our procedure even less judicial than it now is and to make the Assembly itself the court to hear the whole case? (b) Would this conception not tend to encourage the election of the members of the Judicial Commission as regular Commissioners as is done now in the case of important Committees, in order that the members of these Committees might have the full rights of Commissioners in debate? (c) Would it not especially accomplish the very thing which Dr. Macartney would guard against in his fourth suggestion, inasmuch as if the Commission is only a Committee its Chairman would have the right under our rules to argue for the Commission's report and to participate in the debate? (d) If the Commission is only a Committee, then, a motion to substitute the minority report for the majority report is at once allowable contrary to the provision of Section 133 with regard to the Report of the Judicial Commission. (e) Will it be possible for any Moderator to enforce in a free General Assembly discussion the limitation specified in Section 133 in the phrase "debatable except on the merits of the case.", and, in Section 134, the exclusion from the Assembly's review of the record of the case and the admission only of "the finding of the facts by the Judicial Commission."

It may be that the Church would not be satisfied to transfer from the

General Assembly to a permanent court, meeting at some other time in the year, the right of final decision. One asks, however, whether the attempt to decide judicial questions in a general convention like the Assembly can ever be anything but unsatisfactory? Perhaps safeguards can be discovered however which will retain our present scheme of popular government in this matter and escape, at least, its gravest difficulties. Or, on the other hand, it may be possible to frame provision for a permanent court, so as to safeguard the rights of the Church at large and of minorities, and yet to secure the determination of our judicial issues by a real court instead of by a general convention which cannot possibly adequately examine the evidence, which can never be qualified to deal judicially with all the questions of law and which, as a convention, is likely to be swayed and perhaps ought to be swayed by other considerations than those which should govern a real court.

Would it not be possible for your Committee by correspondence to work out some definite proposals, which you could consider together at a meeting in Chicago prior to the General Council meeting on November 29-30th. The Committee on Marriage and Divorce meets on the morning of the 29th. Could you not have a meeting on Monday, the 28th.

With warm regard,

Very cordially yours,

signed Robert E. Speer

RES: C

## THE PERMANENT JUDICIAL COMMISSION

The General Assembly shall erect a Judicial Commission to be known as the Permanent Judicial Commission of the General Assembly.

The General Assembly shall direct the General Council to select and nominate to the General Assembly fifteen persons whose names the General Assembly, if it confirms the nominees, shall transmit to the Presbyteries. The nominees shall be voted for by the Presbyteries. Each nominee must receive a majority of the votes cast in each Presbytery and two-thirds of the whole number of Presbyteries voting in order to elect any one or all of the nominees.

The Permanent Judicial Commission shall be composed of fifteen members, eight of whom shall be ministers and seven of whom shall be ruling elders. Not more than one member of said Commission shall belong to the same Synod.

At the first election fifteen persons shall be selected - five to serve for two years, five for four years, and five for six years, and, thereafter five persons shall be nominated by the General Council, reported to and sent down by the General Assembly to the Presbyteries to be elected by them bi-annually to serve for six years.

The terms of the members of the Commission shall begin with the dissolution of the General Assembly at which they are



declared to have been elected. It shall be the duty of the General Assembly to canvass the votes for said Commissioners in the same manner that is now required for the canvassing of the returns on overtures. The canvass having been made, it shall be the duty of the Moderator to declare in the same form of declaration he is now required to make in the adoption of an overture by the Presbyteries the person or persons elected.

No person who holds any official position in the Church under the immediate jurisdiction of the General Assembly shall be eligible to accept membership on the Permanent Judicial Commission.

Vacancies due to death, resignation, or failure of election by the Presbyteries shall be filled by the General Assembly, only at any meeting thereof, by the election of a qualified person or persons for the unexpired term, provided the person or persons shall have been nominated to the General Assembly by the General Council.

The General Assembly shall transmit to the Permanent Judicial Commission any and all judicial business, papers, cases and problems involving judicial jurisdiction, and, may transmit to said Commission any case, administrative or judicial, requiring judicial adjudication, and may refer to the Commission any and all polity matters, questions and interpretations.

(The above suggestions are amendments to paragraph 125, p. 402, of the Book of Church Discipline, 1924. Copy paragraphs 126 and 127 on p. 403.)

The meetings of the Permanent Judicial Commission shall

be held at any time and place said Commission may elect, provided the Commission shall assemble on the Tuesday morning prior to the convening of the General Assembly on Thursday morning of each year. The Commission may report its judgments to the General Assembly on the first Friday of the General Assembly's session.

(This is a modification of paragraph 128, on p. 403, B. of D.)

The decisions of the Permanent Judicial Commission, elected by the General Assembly and sitting instead of the General Assembly of the Presbyterian Church in the United States of America, shall be the final judgment in each case issued and tried before said Permanent Judicial Commission, provided the litigants may have the right to appeal to said Commission for a rehearing or a retrial of the case. The Permanent Judicial Commission shall be empowered to grant a rehearing or a new trial provided the facts, laws and conditions on which a rehearing or a retrial may be justified exist, and are presented in legal form to the Commission.

The litigants before the Permanent Judicial Commission shall have the right, should the General Assembly confirm the judgment of the Commission, to petition said Commission to modify or suspend the judgment of said Commission, provided said modifications, if granted by the Commission, shall be submitted to the next General Assembly for confirmation.

The decisions rendered by the Permanent Judicial Commission and confirmed by the General Assembly shall be binding and shall become the rule of action in all cases involving the points at

issue on which the decision has been rendered and confirmed by the General Assembly.

Should the General Assembly reject the judgment of the Permanent Judicial Commission, said rejection shall automatically act as recommittal for retrial of the case by the Permanent Judicial Commission. Should the next General Assembly reject the second judgment of the Commission the General Assembly then shall appoint a person or persons to represent said General Assembly before said Commission in the further consideration of the case. The third judgment rendered by the Permanent Judicial Commission in the case shall become the confirmed judgment of the General Assembly without further action by the General Assembly.

#### PROCEDURE

1. Any member or members of the Permanent Judicial Commission shall have the right to make, form and read to the General Assembly and file with the Stated Clerk a dissenting opinion or opinions, Said dissenting opinion or opinions shall be printed in the Minutes of the General Assembly following the judgment that may be adopted by the General Assembly in the case at issue, provided the person or persons forming, reading and filing said dissenting opinion or opinions shall have read at least twenty-four hours previously to the Permanent Judicial Commission his or their dissenting opinion or opinions. Said dissenting opinion or opinions shall not contain matters or subjects outside the boundaries of the case under consideration.

2. The verdict of the Permanent Judicial Commission shall be read to the General Assembly. The dissenting opinion or opinions shall be read immediately thereafter to the General Assembly.

3. No member of the Permanent Judicial Commission shall argue for or against the judgment or in any way participate in the proceedings of the General Assembly in the adoption or rejection of the judgment of the Permanent Judicial Commission.

4. No person or persons forming, reading and filing dissenting opinion or opinions shall have the right to argue for or against said dissenting opinion or opinions before the General Assembly in its proceedings to adopt or reject the judgment of the Permanent Judicial Commission.

4. The Moderator of the General Assembly, immediately after the reading of the judgment of the Permanent Judicial Commission and the reading of the dissenting opinion or opinions, should there be such, shall put the question as follows: "Shall the judgment of the Permanent Judicial Commission become the confirmed judgment of the General Assembly?"

6. The General Assembly immediately after the putting of the question without debate shall vote.

7. Members of the General Assembly from the Presbyteries or Synods involved in the trial of a case shall be prohibited from voting on the confirmation or rejection of the judgment of the Permanent Judicial Commission.

8. Prior to the putting of the question the Moderator

shall explain to the General Assembly that all members of the courts involved in the trial of the issue are prohibited from voting.

9. The Moderator, when convening the General Assembly and constituting the said General Assembly as a court, shall explain to the said General Assembly that when the Assembly is constituted a court the members present at the moment of its constitution as a court shall be and are the only members constituting the court. Should other members of the Assembly who were absent at the constitution of the court approach the door of the Assembly when constituted as a court, they shall be warned that they can not sit during the time the Assembly as a court is receiving the judgments of the Permanent Judicial Commission.

10. The Moderator shall further explain that no member of the court as constituted shall be permitted to leave the court until the General Assembly as a court has received the judgments of the Permanent Judicial Commission and voted on the confirmation of said judgments. In other words, the Moderator shall explain to the court that only the members present at the time of its constitution as a court are eligible to sit, and that they shall not be permitted to leave the court nor shall those who were not present at the time of its constitution be permitted to join the court during the consideration of the judgments of the Permanent Judicial Commission. Further, all other persons, except the officers of the General Assembly and the members of the Permanent Judicial Commission, shall be

excluded from the floor of the General Assembly while sitting as a court.

11. When the General Assembly sitting as a court renders its verdict by confirming the judgment of the Permanent Judicial Commission, said judgment shall become the permanent and binding judgment constituting the rule of action for all litigants and the Church on the points at issue in the trial and just decided by the court.

(This is a modification or amendment of paragraph 129, p. 403. Adopt paragraph 150 on p. 403 and p. 404, provided you omit the word "preliminary" before the word "judgment" on p. 403, and the word "preliminary" before the word "judgment" on p. 404. Copy paragraphs 131, 133, 134. Repeal paragraph 132.)

#### UNIVERSAL APPLICATION

If the Permanent Judicial Commission is erected as hereinbefore described, and if the report herewith submitted is adopted by the Council and the Assembly, and is sent by the Assembly to the Presbyteries as an overture, and should said overture be adopted by two-thirds of the Presbyteries voting, it should be made to apply to the Synods and the Presbyteries. The Judicial Commissions in the Synods and the Presbyteries should be elected in the same ratio, namely, Synodical Judicial Commissions should have nine members - five ministers and four ruling elders; Presbyterial Judicial Commissions should have seven members - four ministers and three ruling elders. The term of office in all the courts should be six years as hereinbefore discussed.

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(This is a corrected copy of all other copies. Please discard all other copies)

Judge Th. Lewis Bruce

December 6, 1927

Rev. W. R. Matthews, D.D.,  
First Presbyterian Church  
Seattle, Washington

My dear Sir:

On the way home from Chicago I read again with the deepest interest and appreciation the report of your committee on our judicial procedure. It seems to me that you have done a notable piece of creative work and that if the Assembly and the Church will adopt the new proposals we shall be carried past many difficulties and into a new dignity and solidity of Church life.

Perhaps it will help you in your purposed revision of your report if I jot down the suggestions that have occurred to me.

1. Would not the difficulty that was suggested with regard to the second paragraph be met by substituting for the last four lines some such words as these - "said nominees to be voted on by the presbyteries and each nominee to require for election a majority vote in at least two-thirds of the whole number of presbyteries voting."
2. When some one asked in the Council meeting what would be the situation if a nominee or all the nominees in one year failed of election by the presbyteries it was replied that these places would stand vacant until nominations were sent down the following year. The first paragraph on page 2 provides, however, that in the case of failure of election by the presbyteries the General Assembly shall elect. Is that the intent of the committee?
3. I do not quite understand the distinction of wording in the second paragraph on page 2 between the clause "involving judicial jurisdiction" and the clause "requiring judicial adjudication."
4. From the last paragraph on page 2 one would infer that the judgments of the commission were to be final without confirmation by the Assembly. The second paragraph on page 3, however, and the paragraph numbered 5 on page 4, both call for confirmation. Would it not be well on page 2 after the word "shall" at the end of the eighth line from the bottom to insert the words "upon confirmation by the General Assembly?"



5. In connection with the third paragraph on page 3, it should be clearly specified that the third judgment of the Judicial Commission shall be final without confirmation by the General Assembly, or if this third judgment is to be made reviewable by the Assembly the processes should be provided for this review. As you will remember, however, with the possible exception of Mr. Orman, the sentiment seemed to be unanimous in favor of making this third judgment final without either confirmation or review by the Assembly. Perhaps we will need to carefully review this point so that we can all stand together with satisfied mind. It will certainly be a great thing if we can thus create a real court.

6. With regard to paragraph number <sup>ed</sup> 11 at the bottom of page 3, we agreed that we not that the last three lines should read - "shall have read the dissent to the permanent Judicial Commission at least twenty-four hours before its presentation to the Assembly; provided also such dissenting opinion shall confine itself wholly to the record of the case and ~~shall not exceed~~ to the proper limits of such an opinion."

7. Would it be well in paragraphs numbered 3 and 4 on page 4 to substitute for the phrase "adoption or rejection" the single word "consideration?"

8. In paragraph number <sup>ed</sup> 12 on page 5, what is the meaning of the phrase - "the floor of the General Assembly?" Would it not allow those who are not members of the court to sit in the gallery or is it the intention to have the Assembly as a court sit absolutely in executive session?

9. Would it not be well to make the language of paragraph number 11 of page 5 and also of the second paragraph on page 5 conform to the statements unanimously adopted on this point by the General Assembly as presented in the report of the Commission of Fifteen. I should think this would help also to meet the difficulty that some might feel in making the judgments of the commission final. We could point out that such judgments while binding in a particular case cannot establish law at variance with the constitution and that the court could later decide another case in accordance with the constitution even if this involved ~~the rejection~~ ~~of~~ previous decisions. In this respect we would be exactly on the same basis as in the case of the United States Supreme Court as indicated as follows:

from Warren - Supreme Court in United States History, Volume III, page 470.

"One other duty towards the Court and towards the public is owed by counsel which should be unflinchingly performed, namely, to insist that the doctrine of stare decisis can never be properly applied to decisions upon constitutional questions. However, the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."

from works of George Bancroft, Volume IV, page 149.

"To the decision of an underlying question of constitutional law no ..... finality attaches. To endure, it must be right."

from Everett W. Abbott - Justice and the Modern Law.

"Any citizen whose liberty or property is at stake has an absolute constitutional right to appear before the Court and challenge its interpretations of the Constitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions. .... When the bar of the country understands this, and respectfully but inexorably requires of the Supreme

December 6, 1927

Court that it shall continually justify its decisions by the Constitution, and not by its own precedent, we shall gain a new conception of the power of our constitutional guarantees."

10. Your last suggestion on page 6 is that this new legislation with regard to the Assembly's Judicial Commission should be followed in Synodical and presbyterial Judicial Commissions. Does that mean <sup>that</sup> in presbyteries and Synods also there might be three judgments and that there could be no appeal to a higher judicatory until after the third judgment? Or would it be wise to provide in the case of these lower commissions for an appeal to the higher judicatory after the first judgment. A member of our presbyteries and Synods may have legislation which makes the judgment of their Judicial Commissions final without review, subject only to appeal to a higher court.

Let me say again how grateful I am, and I am sure every other member of the Council, for the courageous and constructive work which your committee has done.

With warm regard,

Very cordially yours,

MM/2

December 6, 1927

Rev. W. R. Matthews, D.D.  
First Presbyterian Church  
Seattle, Washington

My dear Mark:

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December 6, 1927

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Let me say again how grateful I am, and I am sure every other member of the Council, for the courageous and constructive work which your committee has done.

With warm regard,

Very cordially yours,

R. B.

M. A. Matthew

First Presbyterian Church  
Seattle, Washington

December 12, 1927

Dr. Robert E. Speer,  
156 Fifth Avenue,  
New York City.

My dear Brother:

I do not know whether or not I sent you a revised copy of the report.

I did not read the copy printed by the Council clerk until I rose to read it in the Council. I was very much chagrined to find many errors in it.

I have written in all the corrections suggested by the Council. (See enclosed copy.) I think you will find that it is about correct. I worked very hard on the principles involved and I hope you like them.

Sincerely yours,

*M. A. Matthew*

*Charles R. Erdman*

THE THEOLOGICAL SEMINARY  
PRINCETON, N. J.

NOV 22 1927

November 19, 1927

My dear Robert:-

The enclosed suggestions in reference to the revisions of the rules relating to the Permanent Judicial Commission may be of service in advance of our meeting next week.

Yours cordially,

*Charles R. Erdman*

Robert E. Speer, D.D.,

New York City.

To the Members of the Special Committee on Judicial Procedure:

The following informal suggestions are not phrased in permanent form, but embody certain principles and intimate certain changes, which may be of service in solving the problems presented to the Committee.

Any revision of the present laws of the Church relating to the Permanent Judicial Commission should avoid two extremes. One extreme would change the Judicial Commission into a court practically independent of the Assembly, the decisions of which court the Assembly could not reject or alter. Such a court would be out of harmony with the Presbyterian system and in all probability would be quite unacceptable to the Church.

On the other extreme there is a danger of making the Permanent Judicial Commission merely a committee of the Assembly with no more power and dignity and with few distinguishing characteristics. This involves the real peril of submitting the decisions of the Commission to a review by the Assembly. Such a review, in case the decisions of the Commission are treated as the report of a committee, would probably demand an impossible expenditure of time and would probably work harm to the whole Church.

It is therefore proposed for your consideration that the suggestions made by Dr. Mudge as to the Book of Discipline, Section 132 and Section 133, should be adopted, excepting the last of the five paragraphs Dr. Mudge has submitted. Instead of this last paragraph, it is suggested that in case a majority of the General Assembly shall vote in the negative upon the preliminary judgment of the Permanent Judicial Commission, a motion shall then be in order to adopt the dissenting opinion, if such opinion has been presented to the Assembly, (or to amend the preliminary judgment of the Commission) or to remand the case to the Commission. None of these motions shall be debatable. In case, however, there is a dissenting opinion, it shall be in order for the Judicial Commission to

*It is suggested that the following be added to the Book of Discipline, Section 133, paragraph 5, after the word "or"*



argue its case before the Assembly by counsel, and for the dissenting opinion to be presented by counsel. The Assembly, however, should sit as a silent, solemn court and should take no part in the debate. After the case has been presented by the counsel of the Commission and the counsel representing the dissenting opinion, the Assembly shall vote.

This would keep from the floor of the Assembly a discussion which might be interminable and in which persons would take part who were not acquainted with the facts of the case and would be presumably less learned in Church law.

Such a procedure would give the Permanent Judicial Commission a status and a dignity quite different from those of any other committee of the Assembly. It would make of the Assembly a court ready when the facts are presented to render its solemn decision, and if necessary to refer back any case to the Judicial Commission for further consideration.

The Assembly when constituted as a court to receive the report of the Judicial Commission is not a "committee of the whole" which should be given the right of debate, but is a court which properly may listen to the evidence and decide either to accept or reject or to remand the decision of the Judicial Commission. In case there is a dissenting opinion, the order of procedure should be as follows:

1. The preliminary judgment of the Commission should be presented.
2. The dissenting opinion should be presented.
3. The dissenting opinion should be defended by its author or his counsel.
4. The preliminary judgment should be defended by a member of the Commission or by counsel. (In either case the counsel must be an elder in the Presbyterian Church.)

5. The Moderator of the General Assembly should put the following question without debate: Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly? If a majority

shall vote in the negative, the Moderator should put the question without debate: Shall the dissenting opinion be made the final judgment of the General Assembly? If the majority shall vote in the affirmative, the dissenting opinion shall be declared to be the final judgment of the Assembly. If the majority shall vote in the negative, the question shall be put without debate: Shall the case be remanded for further hearing?

Membership: It will further strengthen and dignify the Judicial Commission in case members are elected to serve for a term of five years. It may also be advisable to have nominations for this Commission made by the General Council. It further may be well to have vacancies filled only by vote of the General Assembly.

Meetings of the Commission: All matters to be considered by the Commission and all papers relating to cases upon which reports are to be made at any General Assembly must be in the hands of the Commission at least thirty days before the meeting of the General Assembly. The Commission should meet in advance of the Assembly so that it can render its report to the Assembly at any time during the Assembly which may be most expedient. Meetings of the Commission shall not be held during the Assembly to consider any new business referred to it by the Assembly.

Further suggestions: No new interpretation of the doctrine of the Church nor of the constitutional law of the Church shall be employed by the Judicial Commission as a basis for its decisions. These decisions must be determined by previous interpretations of the Assembly.

A formula should be prepared to be employed by the Moderator when constituting the Assembly as a special court for the hearing of the report of the Special Commission. The formula should make it plain that the Assembly is about to sit as a court of Jesus Christ; that each Commissioner is to be a judge; that there is to

be no debate, but that each Commissioner is to render a solemn judgment in accordance with facts presented.

Amendments: The above suggestions will obviously require amendments both of the Constitution of the Church and also of the Manual of the General Assembly.

In The Book of Discipline, Chapter 13, Section 129, which reads: "The decision of the Commission in any case shall be held to be the preliminary judgment in the case", must be changed to read: "The decision of the majority of the Commission in any case shall be held to be the preliminary judgment in the case."

Section 132 should be amended by adding: "The dissenting opinion must be presented to the Permanent Judicial Commission before it is presented to the Assembly, and it must be filed with the Stated Clerk of the Assembly at least twenty-four hours before the Commission reports to the Assembly."

The Manual of the Assembly will need to be amended.

In rule 6, page 69, of the Manual it states, "Immediately after the organization of the Commission at any meeting of the General Assembly the facts shall be reported to the General Assembly." It should be added "By the Moderator of the Commission, and at the same time he shall report as to vacancies existing, etc."

The rule relative to notices should be amended (page 67). It now provides that when a case is to be taken to the General Assembly from a lower judicatory, the Stated Clerk of that judicatory shall send a notice concerning such case to the Stated Clerk of the Assembly. It should be added: That this notice must be accompanied by all the papers and records and by the names of the litigants, and that these must be in the hands of the Stated Clerk, especially the names of the litigants, at least thirty days before the meeting of the Assembly. The Stated Clerk should immediately notify the Clerk or the Moderator of the Judicial Commission, and information should be sent to all interested parties as to the exact place and time of the meeting of the Commission.

November 11, 1927

Rev. Henry C. Swearingen, D. D.,  
Rev. Charles R. Fedman, D. D.,  
Rev. J. M. MacIvor, D. D.,  
Mr. R. A. Reed.

My dear Friends:

I herewith submit some tentative suggestions for our discussion on Monday morning, November twenty-eighth.

I believe I can defend those points; and if you agree to the establishment of a Permanent Commission along the lines suggested, I think we will render the greatest service that has ever been rendered the Church in its judicial departments.

I also make suggestions regarding amendments to the present rules. I believe I can defend them before you.

I hope you will meet me sometime on Monday the twenty-eighth, in order that we may have a free and full discussion and arrive at a satisfactory conclusion.

I am sending the Moderator a carbon copy of this report and letter.

I should be glad to have your telegraphic approval of the suggestions.

Thanking you in advance, I am

Sincerely yours,

Encl.

W. G. Matthews

NEW PERMANENT JUDICIAL COMMISSION

----oooOooo----

The General Assembly shall erect a commission to be known as the Permanent Judicial Commission of the General Assembly.

Said Permanent Judicial Commission shall be composed of fifteen members, eight of whom shall be ministers and seven shall be ruling elders. Not more than one member of said commission shall belong to the same synod. At the first election fifteen persons shall be elected - five to serve for two years, five for four years, and five for six years, and thereafter five persons shall be elected bi-ennially to serve for six years. The terms of the members of the commission shall begin with the close of the General Assembly at which they are elected. No person having served upon the Permanent Judicial Commission shall be eligible for reelection or reappointment. No person shall be eligible to membership on the Permanent Judicial Commission who is a member of any other commission of the General Assembly. Vacancies shall be filled by the General Assembly only, at any meeting thereof, by the election of a qualified person for the unexpired term. The General Assembly shall transmit to said Permanent Judicial Commission any and all judicial business, papers, cases and problems involving judicial jurisdiction.

The above suggestions are amendments to paragraph 125, page 402, of the Book of Discipline, year 1924. Copy paragraphs 126 and 127 on page 403.

The meetings of the Permanent Judicial Commission shall be held at any time said commission may elect to hold its session provided that said commission shall assemble the fourth Tuesday morning in May, prior to the convening of the General Assembly on Thursday morning of each year.

This is a modification of paragraph 128 on page 403.

The decisions of the Permanent Judicial Commission elected by the General Assembly and sitting instead of the General Assembly of the Presbyterian Church in the United States of America shall be the final judgment in each case issued and tried before said commission, provided the litigants may have the right to appeal to said Judicial Commission for a rehearing or a retrial of the case. Said Judicial Commission shall be empowered to grant a rehearing or a new trial, provided the facts, laws and conditions on which a rehearing or a new trial may be justified exist, and are presented in legal form to said commission. The decisions of the Permanent Judicial Commission shall be final, provided further, that the litigants shall have the right to appeal to the General Assembly on the ground of prejudice, or upon the establishment of the fact that the Judicial Commission is doctrinally or heretically biased to an extent jeopardizing the rights of the litigants before said court. The General

Assembly shall, upon the presentation and establishment of said facts, erect a Special Judicial Commission before which the whole case shall be issued, tried and decided. The decision of the Special Judicial Commission in the case shall become the final judgment of the General Assembly of the Presbyterian Church in the United States of America. The litigants, before the Permanent Judicial Commission and before the Special Judicial Commission elected by the General Assembly, shall have the right to petition said Permanent Judicial Commission or said Special Judicial Commission to modify or suspend the judgment of said commission. The decision rendered by the Permanent Judicial Commission or by the Special Judicial Commission shall be binding and shall become the rule of action in all cases involving the points at issue upon which the decision has been rendered.

This is a modification or amendment of paragraph 129, page 403. Adopt paragraph 130 on page 403 and page 404, provided you omit the word "preliminary" before the word "judgment" on page 403, and the word "preliminary" before the word "judgment" on page 404. Copy paragraph 131. Repeal paragraph 132 and insert instead the clause providing for the election of the Special Judicial Commission on the ground of prejudice before which the case shall be reissued. Copy paragraphs 133 and 134.

If the Permanent Judicial Commission is elected and submitted as an overture to the presbyteries and is adopted by them, it should apply to the synods and presbyteries, and the Permanent Judicial Commission in the synods and in the

presbyteries should be elected in the same ratio, namely, a synod's Judicial Commission should have nine members - five ministers and four elders; a presbytery's Judicial Commission should have seven members - four ministers and three elders. The term of office in all cases should be six years.

DISCUSSION OF THE PRESENT JUDICIAL COMMISSION  
WHICH REFERS ONLY TO THE COMMISSION AND TO  
ITS RULES AS NOW IN OPERATION.

For the sake of convenience it may be well to recall the precise language of the present rules:

132. Immediately upon the presentation of the preliminary judgment in a case, any member or members of the Commission shall have the right to read and file a dissenting opinion or opinions.

133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any, shall be as follows:

Immediately upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the Moderator of the General Assembly shall put the question without debate, "Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?"

If a majority shall vote in the affirmative,



the preliminary judgment of the Permanent Judicial Commission shall be declared by the Moderator to be the final judgment of the General Assembly.

If a majority shall vote in the negative, a motion, debatable except on the merits of the case, will be in order to review the preliminary judgment of the Permanent Judicial Commission.

134. The preliminary judgment in any case when reviewed by the General Assembly to which it has been reported, may be affirmed, reversed, modified, suspended, or remitted for further hearing. In this review, instead of the record in the case, the finding of the facts by the Judicial Commission shall be read. On such review, if the case be not remitted, the decision of the General Assembly shall be held to be its final judgment. If the case be not reviewed and no decision be reached, then at the dissolving of the same, the preliminary judgment of the Permanent Judicial Commission shall be held to be the final judgment of the General Assembly.

If we are not to move for the erection of a Permanent Judicial Commission, and if the present awkward machinery is to continue, then the paragraphs above quoted should be amended as follows:

FIRST - Any member of the Permanent Judicial Commission shall have the right to form and read to the Assembly, and file with the Stated Clerk, a dissenting opinion. Said dissenting opinion shall be printed in the Minutes of the General Assembly following the judgment that may be adopted by the General Assembly in the case at issue, provided the person or persons forming, reading and filing said dissenting opinion, shall have previously given notice to the Permanent Judicial Commission of his intent to dissent and to file his dissenting opinion.

SECOND - The verdict of the Permanent Judicial Commission shall be read to the General Assembly. The dissenting opinion shall be read immediately to the General Assembly.

THIRD - No member of the Permanent Judicial Commission shall argue for or against the verdict or in any way participate in the proceedings of the General Assembly in the adoption or rejection of the verdict.

FOURTH - No person or persons forming and reading a dissenting opinion shall have the right to argue for or against said dissenting opinion before the General Assembly in its proceedings to adopt or reject the verdict of the Permanent Judicial Commission.

FIFTH - The Moderator of the General Assembly shall, after the reading of the verdict and the dissenting opinion, if there be one, put the question, "Shall the verdict of the Permanent Judicial Commission become the confirmed verdict of the General Assembly?" If the General Assembly rejects the verdict, the responsibility then devolves upon the General Assembly to institute further proceedings. Said proceedings may proceed under the following motions:

1. To remit the case for retrial, or for a rehearing on any special point of the case, or to review the case by the Assembly as a court, or to modify the verdict, or suspend the judgment.

2. The motions above suggested shall be made, seconded and put after debate on the motion. There shall be no debate on the merits of the case. The debate shall rest upon the reasons for the motion not upon the merits of the case. Should the debate in any way discuss the merits of the case, the Moderator shall rule the debater from the floor and give his time to another speaker. The reason for prohibiting any member of the Judicial Commission from speaking is because the Judicial Commission is not a part of the General Assembly. It becomes for the moment an inferior court. The General Assembly, when it rejects the verdict of the Permanent Judicial Commission, assumes all responsibility for the case, and therefore the Permanent Judicial Commission shall be prohibited from entering into the discussion of the case because said discussion would jeopardize the rights of the commissioners who are at the instance lifted into the position of members of the General Assembly as a court.

3. Members of the General Assembly from the presbyteries and synods<sup>involved</sup> in the trial of a case shall be excluded from participating in the trial of the case, and said members from said presbyteries and synods shall be prohibited from voting on the reception or the rejection of the verdict, or in any of the proceedings the General Assembly may take in the settlement of the case from the presbyteries and synods of which said commissioners may be members.

4. If errors, which might jeopardize the rights of

the courts involved, or of the persons involved, are committed by the Permanent Judicial Commission or by the General Assembly in receiving the verdict, the General Assembly shall recommit the case to the Permanent Judicial Commission for a rehearing or a retrial. Results of said rehearing or retrial shall be submitted to the next General Assembly.

5. The General Assembly when sitting as a court shall call the roll. At the conclusion of the call of the roll only the members who report present shall be constituted and made a part of the General Assembly as a court. All other members shall be excluded from the floor of the General Assembly until the case under consideration shall have been decided. No member of the General Assembly thus constituted as a court shall be permitted to leave the General Assembly during the hearing of the case unless the General Assembly decides to try the case by hearing all the evidence and all the witnesses, in which event the trial might involve days; then, the General Assembly shall call the roll at the beginning of the case, and, shall again call it after each recess. Only the members forming the court at the beginning of the case shall be permitted to sit or vote or participate in any way in the trial of the case.

6. When the General Assembly, sitting as a court, renders its verdict, that verdict shall become the permanent and binding verdict constituting the rule of action for the litigants and the Church on the points at issue in the trial and decided by the court.

There shall be a Commission of Appeals of the Presbyterian Church in the United States of America consisting of nine members, five of whom shall be ministers and four ruling elders. No person shall be a Commissioner who shall not have attained the age of thirty-five years and who shall not have been continuously for ten years preceding his appointment a member of, or an ordained minister in, the Presbyterian Church in the United States of America.

Five members of the Commission shall form a quorum and the concurrence of five shall be necessary to a decision. The Commission shall elect one of their members Moderator. The Stated Clerk of the General Assembly shall be the clerk of the Commission and shall have power to provide any necessary attendants.

Members of the Commission shall be appointed by the Moderator of the General Assembly, by and with the consent of the General Assembly and shall hold office for six years. The Moderator of the General Assembly of the Session of 192 shall appoint, by and with the consent of the General Assembly, two members of the Commission for one year, two members for two years, two members for three years, one member for four years, one member for five years and one member for six years. When a vacancy shall occur in the membership of the Commission, it shall be filled for a full term.

No member of the Commission shall be eligible for reappointments until six years have elapsed and no member of the Commission during his term shall hold any other office in the Presbyterian Church of the United States of America and any votes cast for or appointment to any other office during his term as such Commissioner shall be null and void.

The Commission shall have <sup>the</sup> jurisdiction to review and to affirm, reverse, modify or to order a new trial or a re-

hearing of any determination made by a Synod and of any complaint against a Synod and to direct the final judgment in any matter or proceeding reviewed by it. The Commission shall have power to make rules of practice and procedure applicable to the Commission and to appoint times and places of the meetings of the Commission. The rules of practice and of procedure now applicable to the Permanent Judicial Commission, not inconsistent with these provisions, shall remain in force until modified or repealed by the Commission of Appeals.

No appeal or review of any determination of the Commission of Appeals shall be had, excepting that any determination of the Commission which affects a doctrine or the constitution of the Church may be reviewed and affirmed, modified or reversed by the General Assembly, held during the year or the year following that in which such decision was made and filed, upon the vote of two-thirds of the Commissioners elected to the said General Assembly. Upon such review, a finding of fact made by the Commission shall not be reviewed by the General Assembly.

Members of the Commission may be removed by a two-thirds vote of the Commissioners elected to the General Assembly but no member of the Commission shall be removed except for cause which shall be entered on the journal, and unless he shall have been served with a statement of the cause alleged and shall have had an opportunity to be heard. On question of removal, the yeas and nays shall be entered in the journal.

Members of the Commission shall receive no compensation for their services, their necessary traveling expenses shall be audited and paid by the Stated Clerk of the General Assembly and all other expenses necessary to the proper work of the Commission.

The Permanent Judicial Commission is hereby abol-

ished. All powers of the Permanent Judicial Commission are conferred upon and shall be exercised by the Commission of Appeals so far as the same are not inconsistent with the foregoing provisions.

*M. Linn Bruce*

M. LINN BRUCE  
68 WILLIAM STREET  
NEW YORK

NOV 2 1927

November 22nd, 1927.

Dr. Robert E. Speer,  
156 Fifth Avenue,  
New York City.

My dear Doctor:-

I have re-drafted my proposed act creating a Commission of Appeals - and enclose a copy. The changes made seem to me desirable.

I am sending a copy to Doctor Mudge and Doctor Robinson for their consideration.

Cordially,

*M. Linn Bruce*



There shall be a Commission of Appeals of the Presbyterian Church in the United States of America consisting of nine members, five of whom shall be ministers and four ruling elders. No person shall be a Commissioner who shall not have attained the age of thirty-five years and who shall not have been continuously for ten years preceding his appointment a member of, or an ordained minister in, the Presbyterian Church in the United States of America.

Five members of the Commission shall form a quorum and the concurrence of five shall be necessary to a decision. The Commission shall elect one of their members Moderator. The Stated Clerk of the General Assembly shall be the clerk of the Commission and shall have power to provide any necessary attendants.

Members of the Commission shall be appointed by the Moderator of the General Assembly, by and with the consent of the General Assembly and shall hold office for six years. The Moderator of the General Assembly of the Session of 192 shall appoint, by and with the consent of the General Assembly, two members of the Commission for one year, two members for two years, two members for three years, one member for four years, one member for five years and one member for six years. When a vacancy shall occur in the membership of the Commission, it shall be filled for a full term.

No member of the Commission shall be eligible for reappointments until six years have elapsed and no member of the Commission during his term shall hold any other office in the Presbyterian Church of the United States of America and any votes cast for or appointment to any other office during his term as such Commissioner shall be null and void.

The Commission shall have sole jurisdiction to

review and may affirm, reverse, modify or order a new trial or a rehearing of any determination made by an inferior judicatory and of any complaint against an inferior judicatory and to direct the final judgment in any matter or proceeding reviewed by it. No member of the Commission shall sit in the Commission in review of a decision made by a judicatory of which he was at the time a sitting member. The Commission shall have power to make rules of practice and procedure applicable to the Commission and to appoint times and places of the meetings of the Commission. The rules of practice and of procedure now applicable to the Permanent Judicial Commission, not inconsistent with these provisions, shall remain in force until modified or repealed by the Commission of Appeals. The Commission shall consider and report its opinion or hear and determine questions or matters of a judicial nature which the General Assembly may refer to it.

No appeal or review of a determination of the Commission of Appeals shall be had, excepting that a decision or determination of the Commission which affects or involves a doctrine or the constitution of the Church may be reviewed and affirmed, modified or reversed by the General Assembly, held during the year or the year following that in which such decision was made and filed, upon the vote of a majority of all the Commissioners elected to the said General Assembly. Upon such review, a finding of fact made by the Commission shall not be reviewed by the General Assembly.

Members of the Commission may be removed by a two-thirds vote of the Commissioners elected to the General Assembly but no member of the Commission shall be removed except for cause which shall be entered on the journal, and unless he shall have been served with a statement of the cause alleged and shall have had an opportunity to be heard.

On question of removal, the yeas and nays shall be entered in the journal.

Members of the Commission shall receive no compensation for their services, their necessary traveling expenses shall be audited and paid by the Stated Clerk of the General Assembly and all other expenses necessary to the proper work of the Commission.

The Permanent Judicial Commission is hereby abolished. All powers of the Permanent Judicial Commission are conferred upon and shall be exercised by the Commission of Appeals so far as the same are not inconsistent with the foregoing provisions.